



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MORBY

DEC 11 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Model CERCLA RD/RA Consent Decree

FROM: Glenn L. Unterberger *Glenn*
Associate Enforcement Counsel for Waste

Bruce M. Diamond, Director *BMD*
Office of Waste Programs Enforcement

TO: Regional Counsel
Regions I - X

Waste Management Division Directors
Regions I - X

I have attached a draft of the Model CERCLA RD/RA Consent Decree for your review and comment. It is responsive to Superfund Management Review Recommendation Number 3.D.

The document has undergone a great deal of scrutiny by a workgroup composed of representatives from OEMC, OWPE, OERR and DOJ and is based upon a document originally drafted by DOJ and Region V for use in helping expedite RD/RA settlement negotiations in that Region. Please transmit your comments to David Van Slyke (382-3050) of OEMC at Room 3105-Mall, Mail Code LE-134s, by January 12, 1989.

cc: Regional Counsel Waste Branch Chiefs
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MODEL CERCLA RD/RA CONSENT DECREE

DRAFT

12/11/89

This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

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UNITED STATES OF AMERICA and
STATE OF

v.

Defendants.

CONSENT DECREE

BACKGROUND

B. The United States in its Complaint seeks:

(1) reimbursement of monies already spent by EPA for removal and remedial actions at the _____ Superfund site in _____, _____, together with accrued interest; (2) an injunction requiring Defendants to perform and fund studies and remedial work at that site in conformity with the Record of

Decision (as defined below) and the National Contingency Plan ("NCP"), 40 C.F.R. Part 300 (as amended); (3) recovery of costs that will be incurred by EPA in connection with such studies and remedial work; and (4) such other relief as the Court finds appropriate.

C. [The State of _____ (the "State") has also filed a Complaint against the Defendants in this Court alleging that the Defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [list applicable state laws], for reimbursement of costs incurred or to be incurred by the State in connection with the _____ site; (2) [describe state causes of action, such as for injunctive relief under state law]; and (3) for such other relief as the Court finds appropriate.]

OR [In accordance with Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of _____ (the "State") on _____, 19__ of negotiations with potentially responsible parties regarding the scope of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to any settlement.]¹

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the [relevant Federal natural resource trustee] on _____, 19__ of negotiations with _____

¹ Throughout this model decree, bracketed language is optional, depending upon the circumstances of each case. For example, the second alternative paragraph C is unnecessary when the State is a party to the Consent Decree.

potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under the trusteeship of [Federal trustee], and EPA has encouraged the [trustee] to participate in the negotiation of this Consent Decree.

E. The Defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiff[s] arising out of the transactions or occurrences alleged in the Complaint[s].²

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the _____ site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on _____, 19__, __ Fed. Reg. _____;

G. In response to a release or a substantial threat of a release of a hazardous substance at or from the Site, EPA [or the Settling Defendants or other PRPs at the Site] commenced in _____, 19__, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.68;

H. EPA [or the Settling Defendants or other PRPs at the site] completed a Remedial Investigation ("RI") Report on _____, __, 19__, and EPA [or the Settling Defendants or other PRPs at the Site] completed a Feasibility Study ("FS") Report on _____, 19__;

² If the Court has granted summary judgment as to liability, a statement that the Court has found the Settling Defendants liable should be substituted for this paragraph.

I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on _____, 19__, and provided opportunity for public comment on the proposed remedial action.

J. The decision by EPA on the remedial action to be implemented at the _____ Site is embodied in a final Record of Decision ("ROD"), executed on _____, 19__, [on which the State had a reasonable opportunity to review and comment/on which the State has given its concurrence.] 3

K. In accordance with Section 121(d)(1) of CERCLA, EPA, [the State], and Settling Defendants ("the Parties") agree that the remedial action plan adopted by EPA and embodied herein will attain a degree of cleanup of Waste Materials released at the Site and control of further releases that assures protection of human health and the environment at the Site.

L. The Parties recognize, and the Court by entering this Consent Decree finds, that implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that entry of this Consent Decree is in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

3 If the ROD to be implemented under this Consent Decree is only an operable unit (OU) ROD, that fact should be made clear in this paragraph and throughout the Consent Decree as needed.

II.

JURISDICTION

This Court has jurisdiction over the subject matter of these actions pursuant to 28 U.S.C. §§ 1331, 1345; 42 U.S.C. §§ 9606, 9607, and 9613(b);⁴ [and pendent jurisdiction over the claims asserted by the State arising under the laws of _____ (state) _____]. This Court also has personal jurisdiction over the Settling Defendants, which, solely for the purposes of this Consent Decree and the underlying Complaint[s], waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Complaint[s] state[s] claims against Settling Defendants upon which relief may be granted.

III.

PARTIES BOUND

A. This Consent Decree applies to and is binding upon the United States and upon Settling Defendants and their directors, officers, employees, agents, [heirs,]⁵ successors, trustees, and assigns.

B. Settling Defendants shall provide a copy of this Consent Decree to each contractor and each subcontractor hired to perform work required by this Consent Decree and to each person representing any Settling Defendant with respect to the Site or the Work and shall condition all contracts and subcontracts

⁴ Include 42 U.S.C. § 6973 if the complaint states a claim based on RCRA § 7003.

⁵ If no individuals are included as Settling Defendants, do not include this term.

entered into hereunder upon performance of the work in conformity with the terms of this Consent Decree. Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be related by contract to the Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Thus, as to acts or omissions of contractors, the Settling Defendants shall not assert a defense based upon CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3).

IV.

DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or its implementing regulations. Whenever terms listed below are used in this Consent Decree or in the Exhibits or Appendices attached hereto or incorporated hereunder, the following definitions shall apply:

A. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

B. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a

Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next working day.

C. "EPA" shall mean the United States Environmental Protection Agency.

D. _____ shall mean the (State Pollution Control Agency or Environmental Protection Agency).

E. "Future Response Costs" shall mean all costs, except Oversight Response Costs, incurred (including indirect costs) by the United States [and the State] with regard to the Site after [date certain such as lodging, entry or the date of the most recent cost update],⁶ including costs incurred pursuant to Sections VII [Five Year Review], VIII [Failure to Attain Performance Standards], X [Access], and XVII [Endangerment and Emergency Response].⁷

F. "National Contingency Plan" or "NCP" shall mean the National Contingency Plan promulgated pursuant to Section 105 of

⁶ It is vastly preferable to structure the settlement in a manner that accounts for and provides for the recovery of all costs incurred by the United States through lodging of the Consent Decree, rather than through some date well prior to the date of lodging.

⁷ In situations involving mixed funding, the definitions of Future Response Costs, Past Response Costs and Oversight Response Costs will need to be modified to reflect that under such a funding arrangement the United States may agree to reimburse "necessary response costs" incurred by other persons. See CERCLA Section 111(a)(2).

CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including any amendments thereto.

G. "Operation and Maintenance" or "O & M" shall mean all activities required under the Operation and Maintenance Plan approved or developed by Plaintiffs pursuant to this Consent Decree and Section __ of the Statement of Work.⁸

H. "Oversight Response Costs" shall mean all costs, including indirect costs, incurred by the United States [and the State] in overseeing the Work, including, but not limited to, the costs of reviewing or developing plans, reports and other items pursuant to this consent decree and verifying the Work.⁹

I. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral.

J. "Parties" shall mean the United States[, the State of _____,] and the Settling Defendants.

K. "Plaintiffs" shall mean the United States [and the State of _____].

L. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on _____, 19__

⁸ A definition of O&M should be used only where O&M will continue for the indefinite future, as is typically the case with capping or other remedial actions that contain incompletely treated wastes on the Site. The SOW should make it clear that the Operation and Maintenance Plan covers only long-term operation, maintenance, and/or monitoring activities after all elements of the operable unit have been constructed or otherwise put in place.

⁹ See footnote 7.

by the Regional Administrator, EPA Region __ , and all attachments thereto.¹⁰

M. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq, (also known as the Resource Conservation and Recovery Act).

N. "Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants to implement the final plans and specifications submitted by the Settling Defendants pursuant to the Remedial Design Work Plan and approved by EPA, including any additional activities required under Sections VII and VIII hereof.

O. "Remedial Design" shall mean those activities to be undertaken by the Settling Defendants to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

P. "Past Response Costs" shall mean all costs, including indirect costs, incurred by the United States [or the State] with regard to _____ Site prior to [date certain such as lodging, entry or the date of the most recent cost update].¹¹

Q. "Statement of Work" or "SOW" shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance at the Site, as set forth in

¹⁰ Several Regions make a practice of attaching the pertinent ROD to consent decrees. While it is appropriate to include the ROD as an attachment, the ROD should not be used as a substitute for a Statement of Work.

¹¹ See footnotes 6 and 7.

Appendix 2 to this Consent Decree and incorporated herein and enforceable hereunder.¹²

R. "Section" shall mean a portion of this Consent Decree identified by a roman numeral and including one or more paragraphs.

S. "Settling Defendants" shall mean (list).

T. "Site" shall mean the _____ Superfund site, encompassing approximately _____ acres, located at [address or description of location] in [name of city], _____ County, [name of state], as described in the Record of Decision and depicted on the map attached as Appendix _____. Notwithstanding the Site boundaries depicted on Appendix _____, the Site includes [description as necessary].¹³

12 Properly-drafted Statements of Work should contain a description of the remedial action at least as detailed as is in the ROD and should provide significantly more detailed guidance than the ROD regarding the steps that must be taken to implement the remedial action and how the Settling Defendants and their contractors should interact with EPA in the development and implementation of the Remedial Design Work Plan and the Remedial Action Work Plan.

13 This definition is of great importance and will often require both care and creativity to ensure that it is clear and comprehensive. For example, it may be desirable to include in the description of Site boundaries a statement to the effect that the Site includes all areas to which Waste Materials released at the Site have migrated and all areas in very close proximity to the contamination that are necessary for implementation of the Work. Similarly, where the geographic scope of the contamination is unknown, the definition may state that all or part of the Site boundary will be determined on the basis of a survey required under the Consent Decree (though you must be careful that the methodology of such a survey is spelled out in detail).

U. "State" [or "Commonwealth"] shall mean the State [Commonwealth] of _____ .

V. "United States" shall mean the United States of America.

W. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any "pollutant" or "contaminant" under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any "hazardous waste" under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5)[; and (4) any "hazardous material" under [State statutory citation]].

X. "Work" shall mean all activities Settling Defendants are required to perform under this Consent Decree, including Remedial Design, Remedial Action and Operation and Maintenance and any activities required to be undertaken pursuant to Sections VII, VIII, X, and XVII.¹⁴

V.

GENERAL PROVISIONS

1. Objectives of the Parties

The objectives of the parties in entering into this Consent Decree are to protect public health and welfare and the environment from releases or threatened releases of Waste

¹⁴ If the Consent Decree is for implementation of an operable unit ROD remedy, rather than a "final" remedy, the definition should read:

X. "Work" shall mean all activities Settling Defendants are required to perform under this Consent Decree to implement the ROD for the _____ [name of OU], including Remedial Design, Remedial Action and Operation and Maintenance for the _____ [name of OU] and any activities required to be undertaken pursuant to Sections VII, VIII, X, and XVII.

Material from the Site by the investigation, development, design and implementation of remedial programs by the Settling Defendants and reimbursement of response costs.

2. Commitments by Settling Defendants

a. Settling Defendants shall finance and perform the Work in accordance with this Consent Decree, including the SOW and all standards, specifications, and schedules set forth therein or developed thereunder, and in a manner consistent with the ROD. Settling Defendants shall also reimburse the United States [and the State] for Past Response Costs, Oversight Response Costs and Future Response Costs as provided in this Consent Decree.

b. The obligations of Settling Defendants to finance and perform the Work and to reimburse the United States [and the State] for Past Response Costs, Oversight Response Costs and Future Response Costs under this Consent Decree are joint and several. In the event of the insolvency or other failure of any one or more Settling Defendants to implement the requirements of this Consent Decree, the remaining Settling Defendants shall complete all such requirements.

3. Compliance With Applicable Law

a. All actions by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable or relevant and appropriate laws, as required by CERCLA and the National Contingency Plan. The United States [and the State] has [have] determined that the

activities contemplated by this Consent Decree are consistent with the NCP.

4. Permits

a. Except as provided in Section 121(e) of CERCLA and the NCP, no permit shall be required for any portion of the Work conducted entirely on the Site. Where any portion of the Work requires a federal or state permit or approval under CERCLA and the NCP, Settling Defendants shall timely submit applications and take all other actions necessary to obtain all such permits or approvals.

b. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

5. Notice of Obligations to Successors-in-Title¹⁵

a. Within thirty (30) days after the entry of this Consent Decree, Settling Defendants shall record a certified copy of this Consent Decree with the Recorder's Office [or Registry of Deeds], _____ County, State of _____. Thereafter, each deed, title, or other instrument of conveyance for property included in the Site shall contain a notice stating that the property is subject to this Consent Decree [and any lien retained by the United States] and shall reference the recorded

¹⁵ Paragraph V.5. should only be included if Settling Defendants include the site owner. It will need to be modified to conform with local requirements regarding recording/registry of deeds.

location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

b. The obligations of each Settling Defendant who owns any interest in property included in the Site, with respect to the provision of access under Section __ [and the implementation of institutional controls under Section __], shall run with the land and shall be binding upon any and all such Settling Defendants and any and all persons who subsequently acquire any such interest or portion thereof (hereinafter "Successors-in-Title").¹⁶ Within ten (10) days after the entry of this Consent Decree, each Settling Defendant who owns any interest in property included in the Site shall record at the Registry of Deeds, or other office where land ownership and transfer records are maintained for the property, a notice of obligation to provide access and related covenants in the form set forth in Appendix __. Each subsequent deed to any such property included in the Site shall reference the recorded location of such notice and covenants applicable to the property. In addition, each such Settling Defendant shall provide for conveyancing and recording of easements for access to such property to the United States [and the State] for purposes of monitoring and implementation of

¹⁶ It may be useful to include in Section III a more formal definition of Successor-in-Title, such as "any person who acquires any possessory interest in property included in the Site that was owned by a Settling Defendant on or after the date of entry of this Consent Decree, other than a person who acquires such interest solely to protect a security interest in the property and who has not exercised any right to enter or possess the property."

the activities required under this Consent Decree. The granting of such easements pursuant to this paragraph shall not operate to make the United States an owner or operator of the site for purposes of liability under any environmental statute administered by EPA.

c. Any Settling Defendant that owns an interest in property included in the Site and any Successor-in-Title shall, within 30 days prior to the conveyance of any such interest, give written notice of this Consent Decree to the grantee and written notice to EPA [and the State] of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree was given to the grantee. In the event of any such conveyance, the Settling Defendants' obligations under this Consent Decree shall continue to be met by the Settling Defendant and, subject to approval by the United States [and the State], by the grantee.

VI.

PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

6. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendants pursuant to this Consent Decree shall be under the direction and supervision of a qualified contractor (hereinafter "Supervising Contractor"), the selection of which shall be subject to approval by EPA [after a reasonable opportunity for review and comment by the State]. Within __ days after the entry of this Consent Decree, Settling Defendants shall notify EPA [and

the State] in writing of the name, title, and qualifications of any Supervising Contractor proposed to be used in carrying out work under this Consent Decree. If at any time thereafter Settling Defendants propose to change Supervising Contractor, Settling Defendants shall give such notice to EPA [and the State] and shall obtain approval from EPA[, after a reasonable opportunity for review and comment by the State,] before the new Supervising Contractor performs any work under this Consent Decree.

b. EPA shall notify Settling Defendants in writing of its approval or disapproval of a proposed Supervising Contractor within __ days of receipt of the notice. If EPA disapproves of the selection of any contractor as Supervising Contractor, Settling Defendants shall submit a list of contractors that would be acceptable to them to EPA within 30 days of receipt of EPA's disapproval of the contractor previously selected. Within __ days of receipt of the list, EPA shall provide written notice of the names of the contractor(s) that it approves. Settling Defendants may select any approved contractor from that list and shall notify EPA of the name of the contractor selected within 21 calendar days of EPA's designation of approved contractors.

7. Remedial Design.

a. In order to expedite the design of the Remedial Action at the Site, Settling Defendants agree to commence and perform remedial design activities as described herein and in the SOW as a contractual obligation effective upon the lodging of

this Consent Decree with the Court. Settling Defendants shall perform such remedial design activities regardless of whether this Consent Decree is entered by the Court. All Oversight Response Costs incurred prior to the entry of the Consent Decree shall be reimbursed after entry in accordance with Section XVIII.

b. Within sixty (60) days after lodging of this Consent Decree, Settling Defendants shall submit for review, modification and/or approval by EPA, [after reasonable opportunity for review and comment by the State,] a work plan for the design of the remedial action at the Site ("Remedial Design Work Plan"). The Remedial Design Work Plan shall provide for design of the remedy set forth in the ROD in accordance with the SOW and, upon its approval by EPA [after a reasonable opportunity for review and comment by with the State], shall be incorporated into and become enforceable under this Consent Decree. A Health and Safety Plan for field design activities shall be prepared in conformance with applicable Occupational Safety and Health Administration and EPA requirements, including, but not limited to [new OSHA regulations (found at 54 Fed. Reg. 9294)].

c. The Remedial Design Work Plan shall include plans and schedules for implementation of all remedial design and pre-design tasks identified in the SOW, including plans and schedules for completion of the following: (1) remedial design sampling and analysis plan (including a Remedial Design Quality Assurance Project Plan (RD QAPP); (2) treatability study; (3) preliminary design submittal in compliance with Paragraph 7.e.; (4)

intermediate design submittal in compliance with Paragraph 7.f.; (5) pre-final/final design submittal in compliance with Paragraph 7.g.; (6) Contingency Plan; (7) plan for satisfaction of permitting requirements; (8) Performance Standards Assessment Plan; and (9) plan for community relations activities. In addition, the Remedial Design Work Plan shall include a schedule to completion of the Remedial Action Work Plan.

d. Upon approval of the Remedial Design Work Plan by EPA [after a reasonable opportunity for review and comment by the State] and submittal to EPA of the Health and Safety Plan for all field activities, Settling Defendants shall implement the Remedial Design Work Plan. Such implementation shall include EPA review and approval, pursuant to Section XII, of all plans, submittals or other deliverables required under Paragraph 7.c. in accordance with the schedule(s) therein. Unless otherwise directed by EPA, Settling Defendants shall not commence remedial design activities at the Site prior to approval of the Remedial Design Work Plan.¹⁷

e. The preliminary design submittal shall include, at a minimum, the following: (1) design criteria; (2) results of treatability studies; (3) results of additional field sampling; (4) project delivery strategy; (5) preliminary plans, drawings and sketches; (6) required specifications in outline form; and (7) preliminary construction schedule.

¹⁷ There may be pre-design studies that are required at the site, and the paragraph should be amended as appropriate if this is the case.

f. The intermediate design submittal, if required by EPA or if independently submitted by the Settling Defendants, shall be a continuation and expansion of the preliminary design. Any value engineering proposals must be identified and evaluated during this review.

g. The pre-final/final design submittal shall include, at a minimum, the following: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality Assurance Project Plan (CQAPP); (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards); and (5) Contingency Plan. The CQAPP, which shall detail the approach to quality assurance during construction activities at the site, shall specify a quality assurance official (QA Official), independent of the construction contractor, to conduct a quality assurance program during the construction phase of the project.

8. Remedial Action.

a. Within ____ days after the approval of the final design submittal, Settling Defendants shall submit for EPA review and approval, [after a reasonable opportunity for review and comment by the State,] a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan"). The Remedial Action Work Plan shall provide for construction of the remedy, in accordance with the SOW, as set forth in the design plans and specifications in the final design submittal and, upon its approval by EPA, [after a reasonable opportunity for review and comment by the State,] shall be incorporated into and become

enforceable under this Consent Decree. A Health and Safety Plan for field activities required by the Remedial Action Work Plan shall be prepared in conformance with applicable Occupational Safety and Health Administration and EPA requirements, including, but not limited to [new OSHA regulations (found at 54 Fed. Reg. 9294)].

b. The Remedial Action Work Plan shall include methodologies, plans and schedules for completion of at least the following: (1) submission of the request(s) for the Remedial Action [and Operation and Maintenance] contract[s] bid proposals; (2) selection of the Remedial Action contractor; (3) execution of the contract for completion of the Remedial Action; (4) implementation of the CQAPP; (5) development and submission of the groundwater monitoring plan; (6) identification of and satisfactory compliance with permitting requirements; (7) implementation of the Operation and Maintenance Plan; (8) implementation of the Contingency Plan; (9) development and submission of the Performance Standards assessment plan; and (10) completion of the Remedial Action and Operation and Maintenance. The Remedial Action Work Plan also shall include a schedule for implementation of all Remedial Action tasks identified in the final design submittal and shall identify the initial formulation of the Settling Defendants' Remedial Action Project Team (including the Supervisory Contractor).

c. Upon approval of the Remedial Action Work Plan by EPA [after a reasonable opportunity for review and comment by the

State], Settling Defendants shall implement the activities required under the Remedial Action Work Plan. Such implementation shall include EPA review and approval of all plans, submittals, or other deliverables (pursuant to Section XII) or other activities required under Paragraph 8.b. in accordance with the schedule(s) therein.¹⁸ Unless otherwise directed by EPA, Settling Defendants shall not commence physical on-site activities at the Site prior to approval of the Remedial Action Work Plan and completion of the activities required under that Plan.

9. Performance Standards. The Work performed by Settling Defendants pursuant to this Consent Decree shall, at a minimum, achieve the Performance Standards specified in the Record of Decision and in Paragraph __ of the SOW. [This section of the Decree should also delineate acceptable methods, statistical and otherwise, to determine compliance with the performance standards.]

10. Settling Defendants acknowledge and agree that nothing in this Consent Decree, or in the SOW or the Remedial Design or Remedial Action Work Plans, constitutes a warranty or representation of any kind by Plaintiff[s] that compliance with this Consent Decree will achieve the Performance Standards set forth in the ROD and in Paragraph __ of the SOW and that such

¹⁸ For those Regions that do not want to review/approve (1) bid packages soliciting contract proposals, (2) the remedial action/O&M contract(s) prior to execution, and (3) the remedial action/O&M contractor(s), this section must be modified.

compliance shall not foreclose Plaintiff[s] from seeking performance of all terms and conditions of this Consent Decree, including the applicable Performance Standards.

11. Settling Defendants shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving state and to the EPA Project Coordinator of such shipment of Waste Material. However, the notification of shipments shall not apply to any such off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

a. The notification shall be in writing, and shall include the following information, where available: (1) the name and location of the facility to which the Waste Material are to be shipped; the type and quantity of the Waste Material to be shipped; the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendants shall notify the receiving state of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Settling Defendants following the award of the contract for Remedial Action construction. The Settling Defendants shall provide all relevant information, including information under the categories noted in Paragraph

11.a., above, on the off-Site shipments as soon as practicable after the award of the contract and before the Waste Material are actually shipped.

VII.

U.S. EPA PERIODIC REVIEW TO ASSURE
PROTECTION OF HUMAN HEALTH AND ENVIRONMENT 19

12. To the extent required by Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations, EPA shall review the Site at least every five (5) years after initiation of the Remedial Action to assure that human health and the environment are being protected by the Work implemented hereunder. Until such time as EPA certifies completion of the Work, Settling Defendants shall conduct the requisite studies, investigations, or other response actions as determined necessary by EPA in order to permit EPA to conduct such review.

13. Settling Defendants and the public shall be provided with an opportunity to comment on any additional activities proposed by EPA as a result of the review conducted pursuant to Paragraph 12 and to submit written comments for the record during the public comment period. After the period for submission of written comments is closed, the Regional Administrator, EPA

19 The CERCLA Section 121(c) five year review process is the subject of a recent memorandum entitled "Performance of Five Year Reviews and Their Relationship to the Deletion of Sites From the National Priorities List" (Jonathan Cannon, 10/30/89) and Recommendation Number 27 of the "Superfund Management Review." The language in this section is likely to be modified as a result of those Superfund Management Review follow-up activities.

Region ___, shall determine in writing whether additional activities are appropriate.

VIII.

FAILURE TO ATTAIN PERFORMANCE STANDARDS

14. In the event that EPA or the Settling Defendants determine(s) that additional response activities are necessary to meet the Performance Standards described in Paragraph 9, notification of such additional response activities shall be provided to the Project Coordinator for the other party.

15. Any additional response activities that Settling Defendants determine are necessary to meet Performance Standards shall be subject to approval by EPA [after reasonable opportunity for review and comment by the State,] and shall be completed by Settling Defendants in accordance with plans, specifications, and schedules approved by EPA pursuant to Section XII.

16. Unless otherwise stated by EPA, within 30 days of receipt of notice by EPA that additional response activities are necessary to meet the Performance Standards, Settling Defendants shall submit for approval by EPA[, after reasonable opportunity for review and comment by the State,] a work plan for the additional response activities. The plan shall conform to the applicable requirements of Paragraphs 7 and 8. Upon approval of the plan pursuant to Section XII, Settling Defendants shall implement the plan for additional response activities in accordance with the schedule contained therein.

IX.

QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

17. Settling Defendants shall use quality assurance, quality control, and chain of custody procedures in accordance with EPA's "Interim Guidelines and Specifications For Preparing Quality Assurance Project Plans" (QAM-005/80), "Data Quality Objective Guidance" (EPA/540/G87/003 and 004) and subsequent amendments to such guidances. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit, for approval by EPA [after a reasonable opportunity for review and comment by the State], Quality Assurance Project Plan(s) ("QAPP") to EPA and the State that is/are consistent with the SOW, the National Contingency Plan and applicable guidances.²⁰ Sampling data generated in accordance with the QAPP(s) shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendants shall assure that EPA personnel or other authorized representatives are allowed access to any laboratory utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling Defendants shall assure that such laboratory(ies), designated by EPA, shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring.

18. At the request of EPA [or the State], Settling Defendants shall allow split or duplicate samples to be taken by EPA[, the State or their] or its authorized representatives, of

²⁰ List, as appropriate.

any samples collected by Settling Defendants with regard to the Site or pursuant to the implementation of this Consent Decree. Settling Defendants shall notify EPA [and the State] not less than fourteen (14) days in advance of any sample collection activity. In addition, EPA [and the State] shall have the right to take any additional samples that EPA [or the State] deem necessary.

19. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering, inspection and enforcement authorities and rights under CERCLA, RCRA and any other applicable statutes or regulations.

X.

ACCESS

20. As of the date of lodging of this Consent Decree, the United States and its representatives, including EPA[, the State]²¹ and their contractors, shall have access at all times to the Site and any property to which access is required for the implementation of this Consent Decree or to conduct actions authorized under CERCLA, to the extent access to the property is controlled by or available to Settling Defendants, for the purposes of conducting any activity authorized by or related to CERCLA, RCRA, the NCP or this Consent Decree, including, but not limited to:

²¹ It may be advisable to obtain access for the state even in those cases where the state is not a party to the consent decree.

- a. Monitoring the Work or any other activities taking place on the property;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing additional response actions at or near the Site;
- f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents; or
- g. Assessing Settling Defendants' compliance with this Consent Decree.

21. To the extent that the Site or any other area where work is to be performed under this Consent Decree is owned or controlled by persons other than Settling Defendants, Settling Defendants shall use best efforts to secure from such persons access for Settling Defendants, as well as for the United States and its representatives, including EPA[, the State] and their contractors, as necessary to effectuate this Consent Decree. For purposes of this paragraph "best efforts" includes, but is not limited to, seeking judicial assistance and the payment of [reasonable sums of] money in consideration of access. If any access required to complete the Work is not obtained within forty-five (45) days of the date of entry of this Consent Decree,

or within 45 days of the date EPA determines in writing to Settling Defendants that additional access beyond that previously secured is necessary, Settling Defendants shall promptly notify the United States. The United States may thereafter assist Settling Defendants in obtaining access. Settling Defendants shall reimburse the United States, in accordance with the procedures in Section XVIII [Reimbursement of Response Costs], for all costs incurred by it, including but not limited to, attorneys fees and the amount of just compensation and costs incurred by the United States, in obtaining access.

22. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights under CERCLA, RCRA and any other applicable statute or regulations or permits.

XI.

REPORTING REQUIREMENTS

23. Settling Defendants shall submit to EPA [and the State] written monthly progress reports which: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include all sampling and tests and all other data generated by Settling Defendants or their contractors or agents in the previous month; (c) include all workplans, plans and other deliverables required by this consent decree completed during the previous month; (d) describe all actions, including data collection and implementation of workplans, which are scheduled for the next

month and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work or Remedial Design or Remedial Action Work Plans, and a description of efforts made to mitigate those delays or anticipated delays; (f) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next month. Settling Defendants shall submit these progress reports to EPA [and the State] by the tenth day of every month following the entry of this Consent Decree until Certification of Completion of the Remedial Action pursuant to Section XVI. In addition, EPA [or the State] may request periodic briefings by Settling Defendants to discuss the progress of the Work.

24. Upon the occurrence of any event during performance of the Work which, pursuant to Section 103 of CERCLA, requires reporting to the National Response Center, Settling Defendants shall promptly orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region __, United States Environmental Protection Agency, in addition to the reporting required by CERCLA Section 103. Within

20 days of the onset of such an event, Settling Defendants shall furnish to Plaintiffs a written report, signed by the Settling Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken to respond thereto.

25. Settling Defendants shall submit each year, within 30 days of the anniversary of the entry of the Consent Decree, a report to the Court and the Parties setting forth the status of the Work, which shall at a minimum include a statement of major milestones accomplished in the preceding year, a statement of tasks remaining to be accomplished, and providing a schedule for implementation of the remaining Work.

XII.

SUBMISSIONS REQUIRING AGENCY APPROVAL

26. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA [after reasonable opportunity for review and comment by the State,] shall either: (a) approve the submission; (b) disapprove the submission, notifying Settling Defendants of deficiencies; or (c) direct that the Settling Defendants modify the submission.

27. In the event of approval by EPA, Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA.

28. Upon receipt of a notice of disapproval or a request for a modification, Settling Defendants shall, within 30 days or such longer time as specified by EPA in its notice of disapproval or request for modification, correct the deficiencies and resubmit the plan, report, or other item for approval. Notwithstanding the notice of disapproval, Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission.

29. If, upon resubmission, the plan, report, or item is not approved, Settling Defendants shall be deemed to be in violation of this Consent Decree. Implementation of non-deficient portions of the submission shall not relieve Settling Defendants of their liability for stipulated penalties under Section XXII.

XIII.

PROJECT COORDINATORS

30. Within 20 days of [lodging/entry] this Consent Decree, Settling Defendants[,the State] and EPA shall notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinator. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor shall be given to the other parties within 5 working days before the changes, unless impracticable, but in no event later than the actual day the change is made. Settling Defendants' Project Coordinator shall have primary responsibility for implementation of the Work at the Site.

31. Plaintiffs may designate other representatives, including EPA [and State] employees, and federal [and State] contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternative Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternative Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and, to take any necessary response action when s/he determines that conditions at the Site may present an imminent and substantial endangerment to public health or welfare or the environment.

XIV.

ASSURANCE OF ABILITY TO COMPLETE WORK

32. Settling Defendants shall demonstrate their ability to complete the Work and to pay all claims that may arise from the performance of the Work by obtaining within 30 days of lodging of this Consent Decree one of the following:

- (a) A surety bond guaranteeing performance of the Work;
- (b) One or more letters of credit equalling the total estimated cost of the Work;
- (c) A guarantee to perform the Work by one or more parent corporations, sibling corporations, subsidiaries, or

unrelated corporations which have a substantial business relationship with at least one of the Settling Defendants; or

(d) Internal financial information regarding Settling Defendants' net worth, cash flow, total liabilities, and current rating for most recent bond issuances sufficient to demonstrate to EPA's satisfaction that one or more Settling Defendants have the financial ability to complete the Work.

33. If the Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 32.c. of this Consent Decree, they must provide financial information regarding the guarantor's net worth, cash flow, total liabilities, and current rating for their most recent bond issuance sufficient to demonstrate to EPA's satisfaction that the guarantor has the financial ability to finance completion of the Work. If Settling Defendants seek to demonstrate ability to complete the Work by means of internal financial information, they shall resubmit sworn statements conveying such information annually, on the anniversary of the effective date of this Consent Decree.

34. In the event that EPA[, after a reasonable opportunity for review and comment by the state,] determines at any time that such financial assurances are inadequate, Settling Defendants shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA [and the State] for approval one of the other forms of financial assurance listed in Paragraph 32. Settling Defendants' inability to demonstrate

financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

XV.

TRUST FUND 22

35. Within 10 days of the lodging of this Consent Decree, Settling Defendants shall present for approval to EPA [and the State] a fully executed trust agreement (the "Trust Agreement") that will establish the _____ Site Trust Fund (the "Trust Fund"). The Trust Agreement shall confer upon the Trustee all powers and authorities necessary to finance the obligations of Defendants under this Consent Decree. Within 10 days of approval of the Trust Agreement by EPA [, after a reasonable opportunity for review and comment by the State,] or 10 days after entry of the Consent Decree, whichever is later, Settling Defendants shall file a fully executed Trust Agreement with the Court. Settling Defendants shall make all necessary payments to fully fund the Trust Agreement in the manner and according to the schedule set forth in the Trust Agreement. Money paid into the Trust Fund by Settling Defendants shall be used solely to pay proper and necessary expenses of the Work to be conducted pursuant to this

22 This trust fund provision is particularly appropriate for multiple defendant consent decrees. It provides both a mechanism for pooling the respective defendants' contributions and assurance that the work will continue to be funded at an appropriate level even if one or more of the settling defendants were to drop out. Alternatively, with modifications to this language, a trust fund can be used as a substitute for the financial assurance provisions in Section XIV, by requiring up-front funding of the estimated cost of the work.

Consent Decree as well as payments required pursuant to Paragraphs 43 [Past Response Costs] and 44 [Future Response Costs and Oversight Response Costs], including expenses of administering the Trust. The Trust Fund may not be used to pay stipulated penalties that may be required to be paid pursuant to Section XXII²³ and shall not be used to pay attorney's fees or other litigation costs of the Settling Defendants.

36. Nothing in the Trust Agreement shall affect Settling Defendants responsibility for compliance with this Consent Decree. Settling Defendants shall provide EPA and the State with written notice at least 10 days in advance of any proposed change in the Trust Agreement or of the Trustee. EPA, through its approval of the terms and conditions of the Trust Agreement or otherwise, does not guarantee the monetary sufficiency of the Trust Fund nor the legal sufficiency of the Trust Agreement.

37. The Trust Agreement shall provide that the Trustee shall, within 60 days of his/her appointment and every 90 days thereafter, submit to Settling Defendants[,] [and] EPA[, and the State] financial reports that include cash flow projections showing the level of funds that will be necessary to pay for the obligations of Settling Defendants under this Consent Decree for

²³ We want to avoid allowing Settling Defendants' stipulated penalty payments to deplete the Trust corpus. For purposes of administrative convenience, however, negotiating teams may want to draft appropriate language to use the Trust as a vehicle for payment of the stipulated penalties. In the event that this accommodation is made for Settling Defendants, provisions need to be drafted providing for replenishment of the corpus plus the last sentence of this paragraph needs to be modified.

the following 180 days and the amount of money currently in the Trust Fund. If the amount of money in the Trust Fund is less than the amount projected in the Trustee's report to be needed for the following 180 days, Settling Defendants shall, within 30 days of submission of the Trustee's report, deposit into the Trust Fund amounts sufficient to bring the level of the Trust Fund up to that projected amount. Settling Defendants shall in any event make payments to the Trust Fund when and to the extent necessary to ensure the uninterrupted progress and timely completion of the Work. Any money remaining in the Trust Fund upon certification by EPA pursuant to Section XVI that all of the Work has been satisfactorily completed and all Past Response Costs and Oversight Costs have been paid shall be returned to Settling Defendants in accordance with the terms of the Trust Agreement.

XVI.

CERTIFICATION OF COMPLETION²⁴

38. Within 90 days after Settling Defendants conclude that the Remedial Action has been fully performed, Settling Defendants shall so notify the United States[,] [and] EPA, [and the State] and shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants[,] [and] EPA [and the State]. Such inspection shall be followed by a written report submitted within 30 days of the inspection by a registered

²⁴ See "Guidance on Certification of Completion of Remedial Action." (OERR)

professional engineer²⁵ and the Settling Defendants' Project Coordinator certifying that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. If, after completion of the pre-certification inspection and receipt and review of the written report, EPA[, after reasonable opportunity to review and comment by the State,] determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree, EPA shall notify Settling Defendants in writing of the activities that must be undertaken to complete the Remedial Action and shall set forth in the notice a schedule for performance of such activities. Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein.

39. If EPA concludes, following the initial or any subsequent notification of completion by Settling Defendants [and after a reasonable opportunity for review and comment by the State], that the Remedial Action has been fully performed in accordance with this Consent Decree, EPA shall so certify in writing to Defendants. This certification shall constitute the certification of completion of the Remedial Action for purposes of this Consent Decree, including Section XXIII [Plaintiffs' Covenants Not to Sue].

25

The field of expertise of the author of the report may vary by the type of remedial action required.

40. Within 90 days after Settling Defendants conclude that all phases of the Work have been fully performed, Settling Defendants shall so notify the United States[,][and] EPA [and the State] by submitting a written report by a registered professional engineer certifying that the Work has been completed in full satisfaction of the requirements of this Consent Decree. EPA shall require such additional activities as may be necessary to complete the Work or EPA shall issue written certification that the Work has been completed, as appropriate, in accordance with the procedures set forth in Paragraphs 38 and 39 for certification of completion of the Remedial Action.

XVII.

ENDANGERMENT AND EMERGENCY RESPONSE

41. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material, or which may present an immediate threat to public health or welfare or the environment, Settling Defendants shall immediately take all appropriate action to prevent, abate, or minimize such release or endangerment, and shall immediately notify the Plaintiff's Project Coordinator, or, if the Project Coordinator is unavailable, Plaintiff's Alternative Project Coordinator. If neither of these persons are available the Settling Defendants shall notify the EPA [Emergency Response Unit], Region _____. Settling Defendants shall take such action in accordance with all applicable provisions of the Health and Safety and Contingency Plans developed pursuant to the SOW. In

the event that Settling Defendants fail to take appropriate response action as required by this Section, and EPA [and/or the State] take[s] such action instead, Settling Defendants shall reimburse EPA [and/or the State] all costs of the response action not inconsistent with the NCP. Payment of such costs of response shall be made in the manner described in Paragraphs 44 and 45 of Section XVII, as applicable, within 30 days of Settling Defendants' receipt of demand for payment and a [name of standard Regionally-prepared cost summary, which includes all direct and indirect costs incurred by EPA and the state and their contractors] of the costs incurred.

42. Nothing in the preceding Paragraph shall be deemed to limit any authority of the United States[, the State,] or this Court to take, direct, or order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

XVIII.

REIMBURSEMENT OF RESPONSE COSTS

43. Within 15 days of the entry of this Consent Decree, Settling Defendants shall, jointly and severally:

a. Pay to EPA \$_____ in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund," and referencing CERCLA Number [Site/Spill ID Number] and DOJ Case Number _____, in reimbursement of Past Response

Costs. The certified check(s) shall be forwarded to [Insert appropriate Regional Superfund Lockbox number and address].

[b. Pay to the State \$_____ in the form of a certified check or checks made payable to _____, in reimbursement of Past Response Costs incurred by the State. The certified check(s) shall be forwarded to _____.]

44. Settling Defendants shall, jointly and severally, reimburse the United States [and the State] for all Oversight Response Costs and Future Response Costs not inconsistent with the National Contingency Plan incurred by the United States [and the State]. The United States [and the State] shall [each] send Settling Defendants a demand for payment by certified mail return receipt requested, which includes a [name standard Regionally-prepared cost summary, which includes all direct and indirect costs incurred by EPA and the state and their contractors] of such costs, on an annual²⁶ basis, with each demand to be made as soon as practicable after the anniversary date of the entry of this Consent Decree.²⁷ Payments shall be made in the manner

²⁶ Some offices in the Agency have advocated monthly billings, rather than annual billings, with interest accruing for all costs not reimbursed within one month of the billing date.

²⁷ Optional language may be included here in the event that a cap on Oversight Response Costs is agreed to by the government(s). Such provisions would only be agreed to in unusual circumstances, typically involving an ability to pay situation. The additional language would read:

Settling Defendants' total liability for Oversight Response Costs under this Paragraph shall be

described in Paragraphs 43 and 45, within 30 days of Settling Defendants' receipt of each demand for payment.

45. Copies of check(s) paid pursuant to Paragraphs 43 and 44, and any accompanying transmittal letter(s), shall be sent to the United States [and the State] as provided in Paragraph 90.

46. Settling Defendants may contest payment of any Oversight Response Costs or Future Response Costs under Paragraph 44 if they determine that EPA [or the state] has made an accounting error or if they allege that a cost item that is included represents costs incurred for efforts undertaken in a

limited to \$_____, exclusive of interest and penalties pursuant to Paragraph [47].

Alternatively, if the Consent Decree includes a cap on total Oversight Response Costs plus an annual cap on payment of Oversight Response Costs, the following language should be used:

If the amount of any such annual Oversight Response Costs for any given year exceeds \$_____, excluding interest and penalties payable pursuant to Paragraph __, such excess shall be carried forward and reimbursed to Plaintiffs in any subsequent year in which annual Oversight Response Costs are less than \$_____; provided, however, once Settling Defendants' cumulative payments reach \$_____, excluding interest and penalties payable pursuant to Paragraph [47], Settling Defendants' obligation to pay Oversight Response Costs pursuant to this Paragraph shall terminate.

If either alternative is used (and both are strongly disfavored), Paragraph XXIII (Covenant Not To Sue) must be revised to add the following as a matter outside of "Covered Matters" (i.e., in the reservations of rights section of the Covenant):

() Any Oversight Response Costs incurred by the United States [and the State] in connection with implementing this Consent Decree not reimbursed by Settling Defendants pursuant to Paragraph 43.

manner that was inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the accounting and must be sent to [the United States if the United States' accounting is being disputed][the State if the State's accounting is being disputed] pursuant to Paragraph 90. Any such objection shall specifically identify the contested Oversight Response Costs or Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendants shall within the 30 day period remit a certified or cashiers check for an amount covering any non-contested Oversight Response Costs or Future Response Costs to the United States [or the State] in the manner described in Paragraphs 43 and 45. Simultaneously, the Settling Defendants shall establish an escrow account in a bank duly chartered in the State of _____ and remit to that escrow account funds equivalent to the amount of the contested Oversight Response Costs or Future Response Costs. The Settling Defendants shall send to the United States [and the State] a copy of the transmittal letter and check paying the uncontested Oversight Response Costs or Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendants shall initiate the Dispute Resolution procedures in Section XXI. If EPA [or the

State] prevails in the dispute, within 5 days of the resolution of the dispute the Settling Defendants shall direct the escrow holder to remit the escrowed monies (with accrued interest) to the United States [or the State, if State costs are disputed] in the manner described in Paragraphs 43 and 45. If the Settling Defendants prevail concerning any aspect of the contested costs, the Settling Defendants shall direct the escrow holder to remit payment for that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States [or the State, if State costs are disputed] in the manner described in Paragraphs 43 and 45; Settling Defendants shall be disbursed the balance of the escrow account.

47. In the event that the payments required by Paragraphs 43, 44 or 46 are not timely made, Settling Defendants shall pay interest on the unpaid balance at the rate established by the Department of the Treasury pursuant to 31 U.S.C. § 3717 and 4 C.F.R. 102.13. Settling Defendants shall, jointly and severally, further pay (1) a handling charge of one (1) percent, to be assessed at the end of each thirty-day late period, and (2) a six (6) percent per annum penalty charge, to be assessed if Settling Defendants have not paid in full within 90 days after the payment is due. Payments made under this paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendants' failure to make timely payments under this Section.

XIX.

INDEMNIFICATION AND INSURANCE

48. The United States [and the State] do[es] not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendants shall indemnify [] and save and hold harmless the United States[, the State,] and its [their] officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action or other costs incurred by the United States [or the State] including, but not limited to attorneys fees and other expenses of litigation and settlement arising from or on account of acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. [Neither] the United States [nor the State] shall [not] be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither Settling Defendants nor any such contractor shall be considered an agent of the United States [or the State].

49. Settling Defendants waive, and shall indemnify and hold harmless the United States [and the State] with respect to, any

claims for damages or reimbursement from the United States [or the State], or for set-off of any payments made or to be made to the United States [or the State], arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including claims on account of construction delays.

50. No later than 10 days prior to commencing any Work, Settling Defendants shall secure, and shall maintain until the fifth anniversary of the termination of this Consent Decree: (i) comprehensive general liability and automobile insurance with limits of _____ million dollars, combined single limit, and (2) environmental impairment liability insurance with limits of _____ million dollars, in each case naming as insured the United States [and the State]. In addition, for the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of workmen's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendants shall provide to EPA [and the State] certificates of such insurance and a copy of each insurance policy. If Settling Defendants demonstrate by evidence satisfactory to EPA [and the State] that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the

same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XX.

FORCE MAJEURE

51. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes entirely beyond the control of the Settling Defendants or of any entity controlled by Settling Defendants, including their contractors and subcontractors, that delays the timely performance of any obligation under this Consent Decree notwithstanding Settling Defendants' best efforts to avoid the delay. The requirement that the Settling Defendants exercise "best efforts to avoid the delay" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible.²⁸

28 Examples of what are or are not force majeure events generally should not be included in consent decrees, as negotiations over what should be in each list are often protracted and not every type of circumstance can be included in the lists. In the event that the negotiations turn in that direction, however, the following type of language should be used.

Examples of events which may constitute force majeure events include extraordinary weather events, natural disasters, national emergencies, delays in obtaining access to property not owned

52. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendants shall notify by telephone the EPA's Project Coordinator, or, in his/her absence, EPA's Alternative Project Coordinator or, in the event both EPA's designated representatives are unavailable, the Director of the Hazardous Waste Management Division, EPA Region __, within forty-eight (48) hours of when Settling Defendants first knew or should have known that the event might cause a delay. Within five (5) business days thereafter, Settling Defendants shall provide in writing the reasons for the delay to EPA [and the State]; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize

or controlled by Settling Defendants despite their timely, best efforts to obtain such access (including offers of payment of reasonable compensation for such access), and delays in obtaining any required approvals or permits that occur despite Settling Defendants' submission of complete requests for approval and applications for required permits (and any supplemental information that may be requested) within a timeframe that would permit the Work to proceed in a manner contemplated by the schedule in this Consent Decree. Examples of events that are not force majeure events include, but are not limited to, increased costs or expenses of the Work to be performed under this Consent Decree, the financial difficulty of Settling Defendants to perform such Work, the failure of one or more of Settling Defendants to satisfy their obligations under this Consent Decree, acts or omissions not otherwise force majeure attributable to Settling Defendants' contractors or representatives, and the failure of Settling Defendants or Settling Defendants' contractors or representatives to make complete and timely application for any required approval or permit.

the delay; a schedule for implementation of any measures to be taken to mitigate the effect of the delay; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. Settling Defendants shall exercise best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure.

53. If EPA[, after a reasonable opportunity for review and comment by the State,] agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are directly affected by the force majeure event shall be extended by agreement of the parties, pursuant to Paragraph 93, for a period of time not to exceed the actual duration of the delay caused by the force majeure event. An extension of the time for performance of the obligation directly affected by the force majeure event shall not, of itself, extend the time for performance of any subsequent obligation.

54. If EPA[, after a reasonable opportunity for review and comment by the State,] does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, or does not agree with Settling Defendants on the length of the extension, the issue shall be subject to the dispute resolution procedures set forth in Section XXI of this Consent

Decree. In any such proceeding, to qualify for a force majeure defense, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of paragraphs 51 and 52, above. Should Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree.

XXI.

DISPUTE RESOLUTION

55. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree and shall apply to all provisions of this Consent Decree.

56. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed thirty (30) days from the time the dispute arises, unless it is extended by agreement between Plaintiff[s] and Settling Defendants. The dispute shall be considered to have arisen when one party notifies the other parties in writing that there is a dispute.

Upon completion of the period for informal negotiations, EPA[, after a reasonable opportunity for review and comment by the State,] shall provide a written statement of position on the disputed matter to Settling Defendants.

57. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding paragraph, then the decision set forth in the statement of position advanced by EPA shall be considered binding unless, within 5 days after receipt of EPA's statement of position, Settling Defendants invoke the formal dispute resolution procedures of this Section by giving written notice to the United States, [and] EPA[, and the State]. After receiving such notice from Settling Defendants, EPA [and the State] shall notify Settling Defendants whether the dispute is to be resolved on the administrative record under Paragraphs 58 below. At its option EPA may determine, which determination shall not be reviewable by a court, that any dispute which relates to the selection, extent, or adequacy of any aspect of any response actions is to be resolved on an administrative record. For purposes of this paragraph, the adequacy of any response action includes: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA [or the State] under this Consent Decree; and (2) the adequacy of response actions performed pursuant to this Consent Decree.

58. If EPA elects, pursuant to Paragraph 57, to resolve a

dispute on an administrative record, the following procedures shall apply:

a. The administrative record shall include the written notification of the dispute, all statements of position, and any other materials submitted by the parties pursuant to Paragraphs 56 and 57 in support of their positions.

b. Within 10 days after receiving notice from EPA that a dispute is subject to resolution on an administrative record, Settling Defendants shall serve on EPA [and the State] a written statement of position on the matter in dispute, including any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon. Within 10 days after receipt of Settling Defendants' statement of position, EPA [and the State] may serve on Settling Defendants additional statements of position (in EPA's case, a "supplemental statement of position"), including supporting documentation, in response to Settling Defendants' statement of position. These 10-day periods for exchange of statements of position may be shortened by EPA upon notice to all parties to the dispute.

c. Upon review of the administrative record, the Director of the Waste Management Division, EPA Region __, shall issue a final decision resolving the dispute.

d. Any decision by EPA pursuant to the preceding paragraph shall be reviewable by this Court, provided that a notice of judicial appeal is filed by the Settling Defendants within 10 days of receipt of EPA's decision.

59. If, pursuant to Paragraph 57, EPA determines that a dispute should not be reviewed on an administrative record, then the position on the dispute advanced by EPA in its initial statement of position following informal negotiations under Paragraph 56 shall be considered binding on all Parties unless, within 10 days after receipt of EPA's determination that review will not be on the administrative record, Settling Defendants file a petition with this Court setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree.

60. In proceedings on any dispute relating to the Work, Settling Defendants shall have the burden of demonstrating that the position advanced by EPA is arbitrary and capricious or otherwise not in accordance with law. With respect to disputes for which an administrative record is developed pursuant to Paragraph 58, judicial review of EPA's decision shall be confined to the administrative record. In proceedings on any dispute, Settling Defendants shall bear the burden of proof. Nothing herein shall prevent the United States [or the State] from arguing that the Court should apply the arbitrary and capricious standard of review to disputes under this Consent Decree other than those relating to the Work.

XXII.

STIPULATED PENALTIES

61. Settling Defendants shall be jointly and severally liable for stipulated penalties in the amounts set forth in Paragraph __ to the United States for failure to comply with the requirements of this Consent Decree, unless excused under Paragraph 51 [Force Majeure]. "Compliance" by Settling Defendants shall include completion of any activity under this Consent Decree or any workplan or other plan approved under this Consent Decree in a manner acceptable to the United States [and the State] and within the specified time schedules established by and approved under this Consent Decree.

62. All penalties shall begin to accrue on the day that complete performance is due or a violation occurs, and continue to accrue through the final day of the noncompliance. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

63. Following the United States' determination that Settling Defendants have failed to comply with any requirement of this Consent Decree, the United States shall give Settling Defendants' written notification of the same and describe the noncompliance. Said notice shall also indicate the amount of penalties due.

64. All penalties owed to the United States under this section shall be payable within 30 days of receipt of the notification of noncompliance, unless Settling Defendants invoke

the Dispute Resolution procedures under Section XXI. Penalties shall accrue from the date of violation regardless of whether the United States has notified Settling Defendants of a violation. Settling Defendants shall pay interest on the unpaid balance, which shall begin to accrue at the end of the thirty-day period at the rate established by the Department of Treasury under 31 U.S.C. § 3717 and 4 C.F.R. 102.13. Settling Defendants shall further pay a handling charge of 1 percent (1%), to be assessed at the end of each 30-day late period, and a 6 percent (6%) per annum penalty charge, to be assessed if the penalty is not paid in full within 90 days after it is due. All payments under this Section shall be paid by certified check made payable to "EPA Hazardous Substances Superfund," shall be mailed to [Regional Lockbox number and address], and shall reference CERCLA Number [Site/Spill ID Number] and DOJ Case Number _____. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Paragraph 90.

65. Neither the filing of a petition to resolve a dispute nor the payment of penalties shall alter in any way Settling Defendants' obligation to complete the performance required hereunder.

66. Settling Defendants may dispute the United States' right to the stated amount of penalties by invoking the Dispute Resolution procedures under Section XXI herein. Penalties shall accrue but need not be paid during the dispute resolution

period. If a disputed matter is submitted to the District Court, the period of dispute shall end upon the rendering of a decision by the District Court regardless of whether any party appeals such decision. If Settling Defendants do not prevail upon resolution, all penalties which accrued prior to and during the period of dispute shall be due within __ days of the rendering of the District Court's decision. If Settling Defendants prevail upon resolution, no penalties shall be paid.

67. If Settling Defendants fail to pay stipulated penalties, the United States may institute proceedings to collect the penalties, as well as late charges and interest. However, nothing in this section shall be construed as prohibiting, altering, or in any way limiting the ability of Plaintiffs to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Decree or of the statutes and regulations upon which it is based.

68. The following stipulated penalties shall be payable per violation per day to the United States for any noncompliance identified in Paragraph 61, above:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 5,000	1st thru 14th day
\$10,000	15th thru 30th day
\$15,000	31st day and beyond ²⁹

²⁹ If the Remedial Action requires an extraordinary number of reports or other periodic written deliverables, it may be appropriate to include a separate stipulated penalty schedule, with lower per day penalty amounts, for certain of

69. No payments made under this Section shall be tax deductible for Federal [or State of ____] tax purposes.

XXIII.

COVENANTS NOT TO SUE BY PLAINTIFFS

70. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 72, 73, [74, 75] and 76 of this Section, the United States [and the State] covenant[s] not to sue or to take administrative action against Settling Defendants for Covered Matters. With respect to all such liability, [except for any future liability relating to response activities at the Site not identified in the ROD or the SOW.] these covenants not to sue shall take effect upon the receipt by EPA [and the State] of the payments required by Paragraphs 43 and 44 of Section XVIII.

those reports. An example of such an additional paragraph is as follows:

____. The following stipulated penalties shall be payable per violation per day to the United States for failure to submit timely or adequate reports [or other written documents] pursuant to Paragraphs ____ [identify paragraph numbers that fit within this category] ____:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 2,500	1st thru 14th day
\$ 5,000	15th thru 30th day
\$ 7,500	31st day and beyond

[With respect to future liability, these covenants not to sue shall take effect upon certification of completion of the Remedial Action pursuant to Paragraphs 38 and 39.]³⁰ These covenants not to sue are conditioned upon complete and satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

FOR COMPLETE RD/RA

71. Except as provided in Paragraphs 72, 73, [74, 75,] and 76, Covered Matters shall include any and all civil liability to the United States for causes of action arising under Sections 106 and 107(a)³¹ of CERCLA [and Section 7003 of RCRA][, and to the State under Section 107(a) of CERCLA and [list any relevant state statutes]], relating to the Site [OR, for the cause[s] of action set forth in the "United States" [and "State"] complaint[s]].

FOR OPERABLE UNITS AND PARTIAL CLEANUPS

30 The underlined bold-typeface bracketed language in this and the preceding sentence is necessary for any consent decree for a complete remedial action, but is unnecessary for an operable unit consent decree, because operable unit consent decrees will not include any covenant for future liability. They will only include a "work done" covenant.

31 In consent decrees such as this that primarily address RD/RA, the decision to grant a covenant not to sue for Section 107 liability for costs should be made consciously. If the Settling Defendants are not agreeing to pay any past or future costs, it may be prudent to refuse to grant the 107 covenant, despite the fact that the Settlers are doing the work.

71. Except as provided in Paragraphs 72, 73, [74, 75,] and 76, Covered Matters shall include any and all civil liability to the United States for causes of action arising under Sections 106 and 107(a) of CERCLA [and Section 7003 of RCRA][, and to the State under Section 107(a) of CERCLA and [list any relevant state statutes]], for performance of the Work and for recovery of Past Response Costs, Oversight Response Costs and Future Response Costs.

72. United States' Pre-certification reservations.³²

Notwithstanding any other provision of this Consent Decree, the United States reserves the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants (1) to perform additional response actions at the Site or (2) to reimburse the United States for additional costs of response if, prior to certification of completion of the Remedial Action :

(i) conditions at the Site, previously unknown to the United States, are discovered after the entry of this Consent Decree, or

(ii) information is received, in whole or in part, after the entry of this Consent Decree,

and the EPA Administrator or his delegate finds, based on these previously unknown conditions or this information together with

³² Consider whether you should add other pre-certification and post-certification reopeners, particularly if it is uncertain whether an identifiable element of the remedy will succeed.

any other relevant information, that the Remedial Action is not protective of human health and the environment.

73. United States' Post-certification reservations.

Notwithstanding any other provision of this Consent Decree, the United States reserves the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants (1) to perform additional response actions at the Site or (2) to reimburse the United States for additional costs of response if, subsequent to certification of completion of the Remedial Action:

(i) conditions at the Site, previously unknown to the United States, are discovered after the certification of completion, or

(ii) information is received, in whole or in part, after the certification of completion, and the EPA Administrator or his delegate finds, based on these previously unknown conditions or this information together with other relevant information, that the Remedial Action is not protective of human health and the environment. The above-mentioned reservations of rights in Paragraphs 72 and 73 include the right to institute proceedings in this action or in a new action to seek reimbursement of costs incurred as a result of actions undertaken pursuant to Section 121(c) of CERCLA, 42 U.S.C. § 9621(c).³³

³³ If the covenant not to sue includes the United States' natural resource damage claim within the definition of Covered Matters, then the reservations for remedy

74. State's Pre-certification reservations.

Notwithstanding any other provision of this Consent Decree, the State reserves the right to institute proceedings in this action or in a new action, or to issue an administrative order³⁴ seeking to compel Settling Defendants (1) to perform additional response actions at the Site or (2) to reimburse the State for additional costs of response if, prior to certification of completion of the Remedial Action:

(i) conditions at the Site, previously unknown to the State, are discovered after the entry of this Consent Decree, or

(ii) information is received, in whole or in part, after the entry of this Consent Decree,

and the [relevant State Administrative Agency Head] or his delegate finds, based on these previously unknown conditions or this information together with any other relevant information, that the Remedial Action is not protective of human health and the environment.

75. State's Post-certification reservations.

Notwithstanding any other provision of this Consent Decree, the State reserves the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking

failure should expressly include the right to bring an action to recover natural resource damages under Section 107(a)(4)(C).

34 May need to modify this sentence and the same sentence in the State's post-certification reopener (Paragraph 75) if there is no state administrative order authority.

to compel Settling Defendants (1) to perform additional response actions at the Site or (2) to reimburse the State for additional costs of response if, subsequent to certification of completion of the Remedial Action:

(i) conditions at the Site, previously unknown to the State, are discovered after the certification of completion, or

(ii) information is received, in whole or in part, after the certification of completion,

and the [relevant State Administrative Agency Head] or his delegate finds, based on these previously unknown conditions or this information together with other relevant information, that the Remedial Action is not protective of human health and the environment.

76. For purposes of Paragraphs 72 and 74, the information received by and the conditions known to the United States [and the State] shall include that information and those conditions set forth in the Record of Decision for the _____ site and the administrative record supporting the Record of Decision. For purposes of Paragraphs 73 and 75, the information received by and the conditions known to the United States [and the State] shall include that information and those conditions set forth in the Record of Decision and any information received by the United States or the State pursuant to the requirements of this Consent Decree.

77. General reservations of rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified to be Covered Matters. The United States [and the State] reserve[s], and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters. In addition, the following are specifically identified as matters that are not Covered Matters:

(1) claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;

(2) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site and not attributable to the Site;

(3) liability for the disposal of any hazardous substances taken from the Site;

(4) liability for damages for injury to, destruction of, or loss of natural resources;

(5) any matter as to which the United States or the State is owed indemnification under Section XVIII above;

(6) criminal liability; and

(7) liability for violations of federal or state law which occur during implementation of the remedial action.

(8) Oversight Response Costs and Future Response Costs, if incurred and not reimbursed to the United States [or the State] pursuant to Paragraphs 44 or 45.

[(9) Previously incurred costs of response above the amounts reimbursed pursuant to Paragraph 43]³⁵

[(10) liability for additional operable units at the Site.]³⁶

77. Notwithstanding any other provision of this Consent Decree, the United States [and the State] retain[s] all authority and reserve[s] all rights to take any and all response actions authorized by law.

XXIV.

COVENANTS BY SETTLING DEFENDANTS; ASSIGNMENT OF CLAIMS

78. Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States [or the State] for any claims related to or arising from Covered Matters or any response action taken with respect to the Site or this Consent Decree, including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 111 or 112 or otherwise, or to seek any other costs, damages or attorneys fees from the United States [or the State] arising out of response activities at the Site. Nothing in this Consent Decree shall be deemed to constitute preauthorization of

³⁵ This reopener should be used when the settlement leaves open (i.e., reserves for future litigation) the payment of any response costs already incurred but not included in the definition of Past Response Costs.

³⁶ This reopener should be deleted if this is not an operable unit consent decree.

a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.25(d). Settling Defendants hereby assign to the United States all claims or causes of action that they may have against any entities that are not Settling Parties regarding Covered Matters as defined in Paragraph 71 and "matters addressed in the settlement" as defined in Paragraph 80.

XXV.

EFFECT OF SETTLEMENT: CONTRIBUTION PROTECTION

79. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including any right to contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

80. For purposes of contribution protection under CERCLA Section 113, "matters addressed in the settlement" includes the Work, Past Response Costs, Oversight Response Costs reimbursed by the Settling Defendants and, if expended by the Plaintiffs, Future Response Costs that are reimbursed by Settling Defendants.³⁷

³⁷ Again, if the settlement reserves for litigation at a future date any Past Response Costs, Oversight Response Costs or Future Response Costs, the "matters addressed in the settlement" should not include those costs.

81. The Settling Defendants agree that with respect to any suit or claim for contribution brought by or against them for matters related to this Consent Decree they will notify the United States [and the State] within 10 days of the initiation of such suit or claim.

82. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant[s] shall not assert, and may not maintain, any defense or claim based upon the principles of waiver or claim-splitting or otherwise based upon any contention that the claims raised by the United States [or the State] in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXXIII. The terms of this Consent Decree and the fact of entry of this Consent Decree do not constitute and are not claim-splitting by any party.

XXVI.

ACCESS TO INFORMATION

83. Settling Defendants shall provide to EPA [and/or the State], upon request, copies of all documents and information within their possession and/or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including sampling, analysis, chain of custody records, manifests, trucking logs,

receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA [and the State], for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

84. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.201(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies specific documents or information when they are submitted to EPA [and the State], or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

85. No claim of confidentiality shall be made with respect to any sampling or analytical data or any other documents or information evidencing conditions at or around the Site.

86. The Parties waive any objection to the admissibility in evidence (without waiving any objection as to weight) of the results of any analyses of sampling conducted by or for them at

the Site or of other data gathered pursuant to this Consent Decree that has been verified by the quality assurance/quality control procedures established pursuant to Section IX.

XXVII.

RETENTION OF RECORDS

87. Until 10 years after EPA certification of completion of the Work, each Settling Defendant shall preserve and retain all records and documents now in its possession or control as of the date of lodging of the Consent Decree that relate in any manner to the Site. At the conclusion of this document retention period, Settling Defendants shall notify the United States [and the State] at least 90 calendar days prior to the destruction of any such records or documents, and, upon request by the United States [or the State], Settling Defendants shall deliver any such records or documents to EPA [or the State].

88. Until 10 years after certification of completion of the Work and termination of this Consent Decree pursuant to Section XXIX, Settling Defendants shall preserve, and shall instruct their contractors and agents to preserve, all documents, records, and information of whatever kind, nature or description relating to the performance of the Work. Upon the conclusion of this document retention period, Settling Defendants shall notify the United States [and the State] at least 90 days prior to the destruction of any such records, documents or information, and, upon request of the United States [or the State], Settling

Defendants shall deliver all such documents, records and information to EPA [or the State].³⁸

89. Settling Defendants each individually hereby certify that they have not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to their potential liability with regard to the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site.

XXVIII.

NOTICES AND SUBMISSIONS

90. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, [the State,] and the Settling Defendants, respectively.

³⁸ Certain Defendants may insist on a statement that documents, records and other information to which the attorney-client privilege or work-product privilege is asserted and proven need not be provided under this Paragraph or Paragraph 87. If such a paragraph is required, then the United States should insist on a paragraph noting that any document, record or information created, generated or collected pursuant to the terms of the Consent Decree and its appendices shall not be withheld on the grounds that the attorney-client privilege or work-product privilege applies to it.

As to the United States:

Chief, Environmental Enforcement Section
Land and Natural Resources Division
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: DOJ # _____

and

Director, Waste Management Division
United States Environmental Protection Agency
Region ____

As to EPA:

[Name]
EPA Project Coordinator
United States Environmental Protection Agency
Region ____

[As to the State:

[Name]
State Project Coordinator
[Address]

As to the Settling Defendants:

[Name]
Settling Defendants' Project Coordinator
[Address]

XXIX.

EFFECTIVE AND TERMINATION DATES

91. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

92. Upon notice by the United States to the Court that EPA [after a reasonable opportunity for review and comment by the State] has certified the Work as complete and that Settling Defendants have satisfied their obligations under Section XVIII [Response Costs], Section XXII [Stipulated Penalties], Section XVI [Endangerment and Emergency Response], Section VIII [Additional Work] and [add other specific Sections of concern], this Consent Decree shall terminate upon the motion of any of the Parties. Termination of this Consent Decree shall not affect the Covenants Not to Sue (Sections XXIII and XXIV above), including all reservations pertaining to those covenants, shall not affect Section XXV [Effect of Settlement; Contribution Protection] and shall not affect any continuing obligation of Settling Defendants under Sections V, VII, VIII, X, XI, XV, XIX, XXVI, XXVII and [specify any other continuing obligations].

XXX.

RETENTION OF JURISDICTION

93. This Court will retain jurisdiction for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XXI hereof.

XXXI.**MODIFICATION**

94. No material modification shall be made to this Consent Decree without written notification to and written approval of the Parties and the Court except as provided in Section XII. The notification required by this Section shall set forth the nature of and reasons for the requested modification. No oral modification of this Consent Decree shall be effective. Modifications that do not materially alter the requirements of this Consent Decree may be made upon the written consent of all Parties, which consent shall be filed with this Court. Nothing in this paragraph shall be deemed to alter the Court's power to supervise or modify this Consent Decree.

XXXII.**COMMUNITY RELATIONS**

95. Settling Defendants shall cooperate with EPA [and the State] in providing information regarding the Work to the public. As requested by EPA [or the State], Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA [or the State] to explain activities at or relating to the Site.

XXXIII.**LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

96. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and

comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

XXXIV.

SIGNATORIES

97. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for Land and Natural Resources of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

98. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil

Procedure, including service of a summons, and any applicable local rules of this Court. 39

SO ORDERED THIS _____ DAY OF _____, 19__.

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. _____, relating to the _____ Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

[Name]
Assistant Attorney General
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

[Name]
Environmental Enforcement Section
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

39 If the Clerk's office in the District where the Decree will be lodged is not willing to permit service to be accomplished in the manner suggested above and the number of Settlers is greater than 10, the signature page for each Settling Defendant should include the following - "Upon the lodging of this Consent Decree, the signatory herein (hereinafter "Signatory") waives all requirements as to service of process set forth in Fed. R. Civ. P. 4. This Signatory further agrees that pending entry of this Consent Decree, all requirements as to service of pleadings and other papers set forth in Fed. R. Civ. P. 5 shall be met by service upon a designated member of the Steering Committee and that Steering Committee shall have the responsibility for distributing copies to the Signatory."

United States v. _____
Consent Decree Signature Page

[Name]
Assistant United States Attorney

District of _____
U.S. Department of Justice
[Address]

[Name]
Assistant Administrator for
Enforcement and Compliance
Monitoring
U.S. Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

[Name]
Regional Administrator, Region ____
U.S. Environmental Protection
Agency
[Address]

[Name]
Assistant Regional Counsel
U.S. Environmental Protection
Agency
Region ____
[Address]

United States v. _____
Consent Decree Signature Page

FOR THE STATE OF _____

Date: _____

[Name]
[Title]
[Address]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. _____, relating to the _____ Superfund Site.

FOR

COMPANY, INC. */

Date: _____

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: _____
Title: _____
Address: _____

*/ A separate signature page must be signed by each corporation, individual or other legal entity that is settling with the United States.